United States Government National Labor Relations Board OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: January 16, 2002

TO : Wayne Gold, Regional Director

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Region 5

FROM : Barry J. Kearney, Associate General Counsel

Division of Advice

SUBJECT: Washington-Baltimore Newspaper Guild

(The Baltimore Sun)

Cases 5-CB-9252, -9254, and 9257

536-2554-3100

These cases were submitted for advice as to the Union's use of a charge and rebate system for \underline{Beck}^1 objectors who are commissioned sales employees with varying monthly incomes.

We conclude that the Union's use of such a system violates Section 8(b)(1)(A).

FACTS

Washington-Baltimore Newspaper Guild ("the Union"), a local of the Communications Workers of America ("the CWA"), represents commissioned sales representatives, as well as employees who receive preset wages, employed by the Baltimore Sun ("the Employer"). The sales employees' monthly incomes vary, depending upon the amount of their sales and commissions during the previous month.

The Union charges members and agency fee payers approximately 1.3 percent of their monthly incomes, rather than a specified flat amount, as dues or fees. The Union maintains a percentage of income dues schedule, which sets forth amounts owed based upon an employee's weekly income. Every change of \$5.00 in weekly income results in a change in the amount of dues or fees owed. In determining amounts payable by Beck objectors, the Union uses a local presumption, relying on the disclosure and chargeability determinations of the CWA.

When a commissioned sales employee becomes a $\frac{\text{Beck}}{\text{objector}}$, the Employer calculates the dues or fees owed by each employee based upon the percentage of dues income schedule described above. It usually takes the Employer four

¹ Communications Workers v. Beck, 487 U.S. 735 (1988).

to six weeks after it calculates an employee's earnings to perform these additional calculations and send the dues or fees to the Union. The Union does not examine the Employer's fee calculations. Next, the Union makes a per capita payment to the CWA. The Union does not provide details of each member's income to the CWA; instead, the Union relies upon the Employer's determination of the appropriate charges.

The CWA runs the $\underline{\operatorname{Beck}}$ program applicable to all nonmembers. When the $\overline{\operatorname{CWA}}$ learns that a nonmember has objected, the CWA contacts the Union to obtain information about the objector's method of compensation. After the Union gives this information to the CWA, if the objector receives established, rather than commission-based wages, the CWA reimburses the objector in advance of the dates when the fees would be due, based upon an advance rebate system. Where the objector's compensation cannot be determined in advance, as in the case of the commissioned sales employees, the CWA calculates the rebate twice a year after the objector has paid the equivalent of full agency fees. The CWA holds in an interest-bearing escrow account any fees it receives during the six months before it sends the rebate to an objector.

The relevant facts underlying these three cases are as follows: The three Charging Parties sent letters to the Union on May 9, 2001, 2 resigning their Union membership. different dates in May, the Charging Parties also sent letters to the CWA's Agency Fee Administrator stating that they wished to become objectors. By letter dated July 31, the Administrator sent to each Charging Party a check for the alleged advance reduction; however, each check was for \$0.00. The letters stated that the Union used a local presumption, that the CWA's nonchargeable activities represented 26.94 percent of its expenditures, that objectors could challenge the CWA's calculations before a neutral arbitrator appointed by the American Arbitration Association, and that in such circumstances a portion of the objectors' fees would remain in escrow until the arbitrator ruled. The Administrator then sent letters dated August 1 stating that the checks sent on July 31 had been sent in error because of a problem with the applicable computer program and that corrected checks would be sent within 10 days. The Charging Parties did not receive such checks.

In August, the Charging Parties wrote to the Agency Fee Administrator to complain about not having received the promised refunds. In October, the Administrator sent

² All events occurred in 2001.

letters to the Charging Parties stating that each would receive a refund of 26.94 percent of the agency fee payments for the period from July 1, 2001, to June 30, 2002. However, because the Charging Parties were commissioned sales employees, the Administrator's letter further stated that the fees they paid would be put into an interestbearing escrow account and that the employees would not receive any refunds, plus interest, until after the Union had received their December 2001 fees and calculated the amount they owed. The letter further stated that the same procedure would be followed at the end of the fee year when the Union received the June fees. Finally, like the Administrator's earlier letter to the objectors, the letter stated that the Union used a local presumption and that objectors could challenge the Union's calculation of their fees before a neutral arbitrator appointed by the American Arbitration Association.

The Charging Parties still have not received any refunds from the Union or from the CWA.

ACTION

A Section 8(b)(1)(A) complaint should issue, consistent with the analysis set forth below.

Initially, the Union violated Section 8(b)(1)(A) by failing to refund any nonchargeable sums to the objectors, for the May-June period regardless of the CWA's computer problems. The Union knew the identities of and the amounts due to the Charging Parties although the Union maintains that it could not make the payments in a timely manner because of a computer problem. The Union committed to sending the rebate within 10 days and failed to do so. This is akin to the "administrative difficulty" defense rejected in UFCW Locals 951, 7 and 1036 (Meijer, Inc.), 329 NLRB 730, 754 (1999).3

It is clear that the use of a charge and rebate system is unlawful, even where the fees are placed in escrow until the union determines the amount due an objector, because the objector is deprived of the use of that money during that period.⁴ Nonetheless, even though the Union receives the

 $^{^3}$ Review granted, enf. denied, 249 F.3d 1115 (9th Cir. 2001), rehearing en banc granted, 265 F.3d 1079 (9th Cir. 2001).

⁴ See, e.g., OPEIU, Local 29 (Dameron Hospital Association), 331 NLRB No. 15, slip op. at 1 fn. 2, 28-29

objectors' fees regularly from the Employer, the objectors receive their refunds only twice a year. Thus, the Union unlawfully maintains a charge and rebate system.

The Union argues that it must use a charge and rebate system because it does not learn the monthly earnings of commissioned employees such as the Charging Parties until several weeks after the Employer pays these employees. As noted above, the time the Employer assertedly needs to calculate commissioned employees' earnings and the applicable fees does not excuse the Union's failure to refund nonchargeable sums to objectors as soon as it receives the relevant information from the Employer.

The fact that such making such prompt refunds to commissioned employees is more time-consuming or administratively difficult than using an advance rebate system for employees who are not on commission does not excuse the Union's actions. The Board rejected a variation of this argument in Meijer, above, where the union, like the one in these cases, maintained a semi-annual charge and rebate system. The union in Meijer argued that it was "too burdensome to require it to make an ongoing prediction of its expenditures for activities and to constantly be adjusting amounts which can be charged for representation activities." 329 NLRB at 754.5 Nonetheless, the Board

(2000); Meijer, 329 NLRB at 754-755 (1999); Machinists Lodge 160 (American National Can Co.), 329 NLRB 389, 391 (1999).

⁵ Grunwald v. San Bernardino City Unified School District, 994 F.2d 1370 (9th Cir. 1993), cert. denied 510 U.S. 964 (1993), cited by the Union, is distinguishable. In that case, the court found lawful a union's policy of placing teachers' agency fees into an interest-bearing escrow account and then granting annual rebates. The court noted that because there were many new teachers at the beginning of each school year, and the union had to apprise all those teachers of their rights, the union had no way of determining for several months how many of those teachers wished to join the union or pay full agency fees and how many wished to forgo union membership and pay only for representational activities. In those circumstances, the court approved of the union's charge and rebate system, referred to by the court as a "deduction-escrow-refund" procedure, see, e.g., 994 F.2d at 1375. Thus, the number and identities of objectors at the beginning of each new school year varied, whereas in this case, the Union knows the identities of the objectors; only the amount of fees they owe varies, depending upon their commission-based earnings.

affirmed the ALJ's conclusion that the union's charge and rebate system was unlawful.

Moreover, the Union can ascertain the nonrepresentational percentage to be applied to objectors' fees because the Union uses a local presumption and the CWA has already determined the percentages of an objector's fees that are spent on chargeable and nonchargeable activities. Thus, the Union can reduce the 1.3 percent dues deduction to reflect the amount of known nonrepresentational expenditures.

Accordingly, a Section 8(b)(1)(A) complaint should issue, absent settlement.

B.J.K.